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No. 94-776

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1994

THE GILLETTE COMPANY,

Petitioner,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

DID THE ACTIVITIES OF THE GILLETTE COMPANY IN MICHIGAN EXCEED THE NEXUS STANDARDS IMPOSED BY PUBLIC LAW 86-272 (15 U.S.C. 381 et seq.) AND THE DUE PROCESS/COMMERCE CLAUSE NEXUS STANDARD?

II.

DID THE MICHIGAN COURT OF APPEALS VIOLATE THE GILLETTE COMPANY'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OR EQUAL PROTECTION IN APPLYING THE DUE PROCESS/COMMERCE CLAUSE NEXUS STANDARD TO A PENDING CASE?

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STATEMENT OF THE CASE

A. The Evolution of Michigan's Test for Determining Nexus.

As this Court discussed in Trinova Corp. v. Michigan Dep't of Treasury, 498 U.S. 358; 111 S. Ct. 818; 112 L. Ed. 2d 884 (1991), the Michigan single business tax (SBT) is a value-added tax. It went into effect on January 1, 1976 and replaced seven different business taxes. 498 U.S. at 366. As this Court noted, for apportionment the Michigan SBT uses the same three-factor apportionment formula that was approved for income taxes. 498 U.S. at 380.

One of the initial questions concerning the SBT was the applicable nexus standard; i.e., whether the SBT was a net income tax to which Public Law 86-272 (15 U.S.C. § 381 et seq.) applied

or whether other constitutional limitations restricted the jurisdictional scope of the SBT, such as those set forth in Scripto, Inc. v. Carson, 362 U.S. 207; 80 S. Ct. 619; 4 L. Ed. 2d 660 (1960), or Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602; 71 S. Ct. 508; 95 L. Ed. 573 (1951). This debate was similar to the question concerning whether the Michigan Business Activities Tax was a tax on income or gross receipts. Trinova, supra, 498 U.S. at 366, fn. 4.

Resolution of this question affected two situations. First of all, the nexus standard would determine the minimum level of activities that had to be conducted in Michigan for imposition of the SBT. Secondly, for purposes of appor-

tionment, the nexus standard would determine the minimum level of activities that had to be conducted in another state in order for sales to customers in those states to be eliminated from the numerator of the sales factor.

In regards to the second situation, if a taxpayer is conducting business in Michigan and one or more other states, the tax base of the taxpayer is apportioned and not allocated. Mich. Comp. Laws 208.41 provides:

> Sec. 41. A taxpayer whose business activities are taxable both within and without this state, shall apportion his tax base as provided in this chapter.

The meaning of "taxable in another state" is set forth in Mich. Comp. Laws 208.42 as follows:

> Sec. 42. For purposes of apportionment of the tax base from business activities under this act, a taxpayer is taxable in another state if, (a) in that state he is subject to a business privilege tax, a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax, a tax of the type imposed under this act, or (b) that state has jurisdiction to subject the taxpayer to 1 or more of the taxes regardless of whether, in fact, the state does or does not.

If a taxpayer is taxable in another state, the numerator of the sales factor of the apportionment formula is determined in accordance with Mich. Comp. Laws 208.51 and Mich. Comp. Laws 208.52 which provide:

> Sec. 51. The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year, and the denominator of which is the total sales of the taxpayer everywhere during the tax year.
>
> Sec. 52. Sales of tangible personal property are in this state if:

> (a) The property is shipped or delivered to a purchaser, other than the United States government, within this state regardless of the free on board point or other conditions of the sales.
>
> (b) The property is shipped from an office, store, warehouse, factory, or other place of storage in this state and the purchaser is the United States government, or the taxpayer is not taxable in the state of the purchaser. For the purposes of this subdivision only, "state" means any state of the United States, the District of Columbia, the commonwealth of Puerto Rico, any territory or possession of the United States, or political subdivision thereof.

(emphasis added).

The sales to which subsection 52(b) applies are commonly referred to as "throwback sales". If the taxpayer is not taxable in the state of the customer (state of destination), the sales are "thrownback" to the state from where the property was shipped (the state of origination).

When the SBT was enacted in 1976, at least one commentator analyzed the nexus standards. In Opper, Constitutional Aspects of the Single Business Tax Act, 22 Wayne L. R. 1167 (1976), the author concluded that PL 86-272 was not applicable to the SBT. Mr. Opper stated:

> Conceptually, the SBT is a consumption-type, value-added tax which, like the South Carolina liquor sales regulatory scheme in Heublein, was not contemplated by Congress when it enacted section 381. Rather, it considered only the particular category of state net income taxes involved in the Northwestern States decision. Moreover, no court ever has held that the federal prohibition applies to taxes other than net income taxes. Therefore, the SBT arguably is unaffected by section 381.

22 Wayne L. R. at 1170.

The Department's initial position, as Mr. Opper observed, was that PL 86-272 did not apply. Mr. Opper explained:

> The position of the Department of Treasury (Department) on the issues of nexus and the application of section 381 is stated in question number five of volume V of the Single Business Tax Questions and Answers (June 15, 1976), as follows:
>
> Q. Will the Department use the same criteria for interstate commerce that was used in determining nexus for Michigan income tax jurisdiction?
>
> A. We conclude that as the SBT is not a net income tax or measured by net income, that [15 U.S.C. § 381 (1976)] will not be used to determine nexus. The Department will follow the guidelines set forth in the Scripto v. Carson Case wherein solicitation in the State by employees, brokers or independent representatives would subject the taxpayer to the SBT. We would be limited by the National Bellas-Hess Case in that out-of-state mail order activities would not be subject to the SBT.

22 Wayne L. R. at 1170-1171.

On March 24, 1978 the Department issued SBT Bulletin 1978-3 entitled "Jurisdictional Standard". For imposi-

tion of the tax upon out-of-state businesses, the 1978 bulletin provided:

> (b) Nexus - The single business tax, being determined as a tax other than a net income tax or a tax measured by net income, removes the single business tax from the federal limitation on state taxes known as P.L. 86-272 (1959).
>
> ***
>
> With the enactment of the single business tax, Michigan's jurisdiction will be based on the pre P.L. 86-272 era, e.g., the same nexus standards developed in the landmark decision of Northwestern States Portland Cement Co. vs. Minnesota and Williams V. Stockham Valves & Fittings, Inc., 358 U.S. 450, 79 S. Ct. 357.

In contrast, for the throwback sales situation SBT Bulletin 1978-3 used PL 86-272. The bulletin stated:

> A Michigan taxpayer can apportion tax base if subject to one of the enumerated taxes in Sec. 42. However, if the taxpayer is protected by the federal limitations of PL 86-272, the taxpayer can not apportion tax base. A Michigan tax-

> payer remitting tax to another state is prima facie evidence that the taxpayer is taxable both within and without this state.

On May 1, 1980, the Department issued SBT Bulletin 1980-1 entitled "Jurisdictional Standard." (Petitioner's Appendix at 181-185). This second bulletin indicated that the Department would use cases decided under PL 86-272 as a guide to determine (1) whether an out-of-state business had sufficient nexus with Michigan for imposition of the SBT and (2) whether a Michigan taxpayer was taxable in another state pursuant to section 42 of the Single Business Tax Act (SBTA).

There were essentially two reasons for the second bulletin. First, the nexus standards for both situations were

made uniform. Secondly, it was believed that Congress in enacting PL 86-272 incorporated the minimum nexus standards enunciated in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450; 79 S. Ct. 357; 3 L. Ed. 2d 421 (1959). Moreover, because the SBT was a business tax similar to net income taxes and franchise taxes imposed upon net income and also used the same three factor apportionment formula, it was more appropriate to use the nexus standard of Northwestern Portland Cement as incorporated in PL 86-272 rather than the standards in Scripto which involved the use tax collection duty. Until this Court's decision in Wisconsin Department of Revenue v. William Wrigley, Jr., 505 U.S. ___; 112 S. Ct. 2447; 120 L. Ed. 2d 174 (1992), it was not clear that PL

86-272 was a step back from the nexus standard suggested in Northwestern Portland Cement.

Because PL 86-272 was more restrictive on Michigan's jurisdiction to impose the SBT than Scripto, no foreign corporations, including Gillette, argued that the Department was using the wrong nexus standard. However, in regards to the throwback sales situation several taxpayers challenged the Department's use of PL 86-272.

Although Gillette claims that it was surprised by the Court of Appeals analysis of the proper nexus standard, the question concerning the applicability of PL 86-272 to the SBT was well known. The first appellate court decision concerning the nexus standard was the

Michigan Court of Appeals decision in Amway Corp. v. Dep't of Treasury, 176 Mich. App. 285; 438 N.W.2d 904 (1989); vacated and remanded 433 Mich. 908 (1989). In Amway the Michigan Court of Appeals applied PL 86-272 and Complete Auto Transit, Inc. v. Brady, 430 U.S. 274; 97 S. Ct. 1076; 51 L. Ed. 2d 326 (1977), as the nexus standard for the throwback sales situation.

Unfortunately, the Michigan Court of Appeals decision in Amway did not resolve the nexus problem. On November 29, 1989, the Michigan Supreme Court vacated and remanded the Amway case. In its order the Michigan Supreme Court stated:

> In lieu of granting leave to appeal, that part of the Court of Appeals judgment which addresses the sales factor under MCL 208.51; MSA 7.558(51) is vacated, and the case

> is remanded to the Court of Appeals for reconsideration, limited to the issue whether the department correctly considered Amway Kentucky sales as Michigan sales in light of Tyler Pipe Industries, Inc v Washington Dep't of Revenue, 483 US 232 (1987). MCR 7.302(F)(1). The Court is to entertain supplemental and other briefing on whether solicitation as a nexus was preserved for appeal, whether PL 86-272 has any application to this case, and the effect of any nexus standard on the constitutionality of § 3(2) of the Single Business Tax Act.

(emphasis added). 433 Mich. at 908.

In Amway, the parties subsequently dismissed the appeal in the Court of Appeals. However, this case was pending in the Michigan Court of Appeals when the Michigan Supreme Court vacated and remanded Amway.

On the same day that the Michigan Court of Appeals decided this case, it also issued its opinion in the case of

Guardian Industries Corp. v. Dep't of Treasury, 198 Mich. App. 363; 499 N.W.2d 346 (1993). In Guardian, which involved the throwback sales issue, the Michigan Court of Appeals concluded that PL 86-272 was not applicable. The Michigan Court of Appeals wrote:

> Public Law 86-272 does not prevent a state from levying taxes listed under § 42 of the SBTA which are not imposed on or measured by net income. Eligible taxes include a franchise tax on the privilege of doing business, a business privilege tax or a corporate stock tax. MCL 208.42; MSA 7.558(42). Therefore, we conclude that § 381 does not provide the minimum nexus standard appropriate for determining whether foreign states' taxation of plaintiffs would violate the due process or the interstate commerce clauses.

(emphasis added). 198 Mich. App. at 372-373.

This is the historical milieu in which this case was litigated. Until

this Court's decision in 1992 in Wrigley, it was the Department's position that PL 86-272 established the minimum nexus standards for constitutional due process. Guardian, supra, 198 Mich. App. at 371. After Wrigley, however, the Department's argument that PL 86-272 incorporated and was co-extensive with the minimum nexus standard suggested in Northwestern Portland Cement was no longer viable. In Wrigley, this Court held that PL 86-272 was a retreat from the nexus standard suggested in Northwestern Portland Cement.

B. The Gillette Litigation

The litigation concerning Gillette's Michigan SBT liability has been ongoing for more than 12 years. On October 1,

1982, the Michigan Department of Treasury issued Final Assessment No. B317249 against The Gillette Company for SBT taxes, penalty and interest for the taxable year 1976. Pursuant to Michigan law, The Gillette Company appealed the final assessment to the Michigan Tax Tribunal without paying any of the tax, penalty or interest. Subsequently, the Department issued two other final assessments (C087970 and C053035) against The Gillette Company for SBT tax, penalty and interest for the years 1977 through 1981. Gillette also appealed those assessments to the Michigan Tax Tribunal, and the three cases were consolidated. To this date Gillette has not paid any SBT taxes for the years 1976 through 1981.

After discovery and after Gillette had requested and received four adjournments of the hearing, the hearing was held in the Michigan Tax Tribunal from March 23, 1987 through April 2, 1987. There were eight days of actual hearing which produced 1,204 pages of transcript and approximately 50 exhibits.

1. Gillette's Activities in Michigan

The Tax Tribunal issued its Opinion and Judgment on February 13, 1989. In its Opinion and Judgment the Michigan Tax Tribunal made extensive findings of fact concerning Gillette's activities in Michigan (Petitioner's Appendix at 206-213). Among the findings of fact of the Tax Tribunal were the following:

> During 1976, Gillette employed 18 full-time salesmen and 22 part-time merchandisers in Michigan. The

> salesmen were provided with rented automobiles and a car trunk inventory of select Gillette products. The salesmen's duties included taking orders for merchandise, replacing defective merchandise and reviewing dealer displays for proper setting to promote saleability. The car trunk inventory of select Gillette products included promotional items and some replacement merchandise. The merchandiser's function included placement of products on customer shelves and keeping management aware of product needs for inventory management.

Petitioner's Appendix at 207.

> Distribution by salesmen during solicitation included samples, displays, free goods, selling aids, promotional material and complimentary merchandise. During the period 1977 through 1981, the Petitioner employed 18 full-time and 14 part-time employees in Michigan.

Petitioner's Appendix at 208.

> Gillette North America had one full-time employee during 1980 and 1981 who held the position of senior district merchandising manager. This merchandising manager had a position outline which was included in Respondent's Exhibit R-16. Duties of the senior district merchandising manager included:

2. To develop action plans to correct retail problems and to advise division management;

***

10. To audit replacement merchandise from merchandisers, and return replaced merchandise to Boston for credit.

Petitioner's Appendix at 208-209.

The senior district merchandising manager was a Dearborn, Michigan resident.

The Safety Razor Division had four full-time employees in Michigan. All were classified as sales representatives. The district sales manager in charge of this group of salesmen was located in the State of Illinois.

The Personal Care Division of Gillette averaged seven full-time employees in Michigan during 1977-981. Six of the seven were classified as sales representatives, and the remaining person was the district sales manager who had an office in Toledo, Ohio, but performed most of his duties in Michigan and resided in Michigan.

Petitioner's Appendix at 209.

The Paper Mate Division of Gillette averaged four employees in Michigan

during 1979-1981. All four employees were classified as sales representative and supervised by a district manager located in the State of Illinois. The district manager performed administrative duties in and outside of Michigan.

Petitioner's Appendix at 210.

Braun North America of Gillette had one employee in Michigan for 1977-1981, a sales representative who solicited sales of expensive cameras at various retailers.

Property of the Gillette divisions located in Michigan included samples, free goods and some replacement merchandise. This was included in the trunk inventory kept by salesmen and located in the leased cars provided to the salesmen by Gillette. Display racks were provided to customers by Gillette. Gillette did not retain title to these display racks upon issuance to a customer and, according to Petitioner, the cost of these display racks was expensed in full on the books of the corporation but was required for tax purposes by the Internal Revenue Service to be amortized over a two-year period.

Petitioner's Appendix at 210.

In 1981, Gillette obtained a Motor Carrier Diesel Fuel Tax License from

> the State of Michigan for the purpose of operating a commercial motor vehicle in Michigan. This license enabled an individual or business to travel in Michigan as a motor carrier and to receive a six cent per gallon discount on the purchase of diesel fuel. Gillette received $35.75 as a rebate on diesel fuel tax paid for the year 1981. A total of 9,265 miles were traveled by the commercial vehicle registered by Gillette in the State of Michigan during 1981 based on Motor Carrier Diesel Fuel tax returns filed.

Petitioner's Appendix at 211.

> Damaged and defective merchandise is eventually returned to Gillette for replacement or adjustment. The larger client or customer is allowed to handle this problem at its own place of business. The sales representative of Gillette will check over the damaged or defective merchandise, send a list to the home office for approval and a credit voucher, and require the customer to destroy the damaged or defective merchandise. There are some accounts, such as Kroger's, that require the sales representative to replace the damaged or defective goods from the car trunk inventory.

Petitioner's Appendix at 212.

> The salesmen negotiate Retail

> Advertising Display Agreements on Gillette's behalf. This agreement is signed by the customer and the salesman for the purpose of providing an incentive for promotion of certain Gillette products. A display allowance is granted if the customer advertises during the promotion period as agreed.

Petitioner's Appendix at 213.

Gillette's sales to customers in Michigan varied from $21,000,000 in 1976 to $34,000,000 in 1981. The amount of Gillette's payroll for Michigan employees ranged from $345,000 in 1978 to $478,000 in 1981. Petitioner's Appendix at 211.

On March 5, 1989, Gillette filed a Motion for Rehearing of the Tax Tribunal's decision. On June 12, 1989, the Tax Tribunal issued its Order Denying Motion for Rehearing. Gillette filed its Claim of Appeal with the

Michigan Court of Appeals on June 23, 1989.

In the Michigan Court of Appeals Gillette again raised issues concerning nexus and administrative procedures. Additionally, Gillette questioned the procedures in the Tax Tribunal. The Court of Appeals issued its Opinion on March 1, 1993. Petitioner's Appendix at 1-18.

2. The Michigan Court of Appeals Decision

In its opinion the Michigan Court of Appeals explained that it was required to accept the factual findings of the Tax Tribunal as long as they were supported by competent, material and substantive evidence on the whole record (Petitioner's Appendix at 4). The

Michigan Court of Appeals also noted the following general facts:

> Petitioner, a Delaware corporation, with its base of operations in Boston, Massachusetts, is a manufacturer and wholesaler of personal care products, razors and ballpoint pens. During the period in question, petitioner maintained a sales staff that called on customers in Michigan. The sales representatives took orders from customers and submitted them to the main office, review customers' displays and shelving arrangements of Gillette merchandise, informed customer of promotions offered by petitioner and replaced defective merchandise.

Petitioner's Appendix at 3-4.

> In the present case, not only did petitioner have a sales staff of at least eighteen full-time sales representatives located in Michigan, it had an ownership interest in promotional and replacement merchandise located in Michigan, leased automobiles for its sales representatives in Michigan and had substantial sales in Michigan generated by the sales staff. Accordingly, we conclude that the single business tax imposed in this case was applied to an activity having a substantial nexus to this state. Scripto, supra; Caterpillar, supra, 417.

Petitioner's Appendix at 13.

On March 22, 1983, Gillette filed a Motion for Rehearing. The Michigan Court of Appeals denied the motion on May 18, 1993. Petitioner's Appendix at 68.

In the Michigan Court of Appeals, while neither party questioned the Department's use of the cases decided under PL 86-272 as a guide for determining nexus, Gillette was aware that PL 86-272 might not be the appropriate nexus standard. In its original brief in the Michigan Court of Appeals (Appellant's Brief dated 11-12-89), Gillette argued that the Tax Tribunal erred in applying a different nexus standard. Gillette's original brief in the Michigan Court of Appeals stated:

VII. ONCE THE DEPARTMENT ADMITTED THAT IT HAD UNIFORMLY APPLIED THE PL 86-272 TEST FOR TAXABLE STATUS IN ALL YEARS AT ISSUE, THE TRIBUNAL ERRED BY APPLYING A DIFFERENT STANDARD TO DETERMINE WHETHER GILLETTE WAS TAXABLE IN MICHIGAN FOR THE YEARS 1976-1979.

Gillette, Original Brief, Michigan Court of Appeals, p. 49.

Gillette filed its Application For Leave to Appeal with the Michigan Supreme Court on June 9, 1993. In its application Gillette complained about the application of the Due Process/ Commerce Clause nexus standard clarified in Quill Corp. v. North Dakota, 504 U.S. ___; 112 S. Ct. 1904; 119 L. Ed. 2d 91 (1992), instead of PL 86-272. In responding to the application for leave to appeal, the Department maintained that Gillette's application lacked any merit because Gillette's activities in Michigan exceeded both nexus standards.

On April 19, 1994, the Michigan Supreme Court denied Gillette's application for leave to appeal (Petitioner's Appendix at 144). Gillette then filed a Motion For Reconsideration. On July 29, 1994, the Michigan Supreme Court denied Gillette's motion for reconsideration. Petitioner's Appendix at 177-178.

On August 31, 1994, after the Michigan Supreme Court denied Gillette's application for leave to appeal, Gillette filed a Complaint for Injunctive Relief in the United States District Court for the Eastern District of Michigan (USDC Docket No. 94-DT-73427-CV). The complaint sought to enjoin the Treasurer of the State of Michigan and the Michigan Commissioner of Revenue from collecting the SBT

assessments which the Michigan Court of Appeals had affirmed. On September 15, 1994, the U.S. District Court dismissed Gillette's complaint based upon the Federal Tax Injunction Act, 28 U.S.C. § 1341.

Gillette immediately filed an appeal with the United States Court of Appeals for the Sixth Circuit (Docket No. 94-2022) and filed a motion for stay or injunction pending appeal. The Sixth Circuit Court of Appeals denied Gillette's motion. Gillette then filed a Motion For Reconsideration which is still pending before the Sixth Circuit.

REASONS FOR DENYING THE WRIT

This case does not present an important question of federal law, nor does it involve a decision concerning federal law which conflicts with decisions of this Court. The question of what nexus standard should be applied is essentially moot because Gillette's activities in Michigan exceeded both nexus standards. Secondly, Gillette is not claiming that its activities in Michigan lacked substantial nexus under the proper nexus standard. Thirdly, the question of whether a state court corrects an inappropriate administrative nexus standard and applies the correct nexus standard retroactively to a pending litigant is a question of state law. Fourth, to the extent that questions of

federal law are implicated, the action of the Michigan Court of Appeals in applying the Due Process/Commerce Clause nexus standard retroactively to a pending litigant is in accordance with the decisions of the Court. Harper v. Virginia Dep't of Taxation, 509 U.S. ___; 113 S. Ct. 2510; 125 L. Ed. 2d 74 (1992).

Finally, this is not a case of selective prospective application. The Michigan Court of Appeals did not state that its opinion in either Gillette or Guardian should be applied prospectively to any taxpayer. Moreover, as indicated in Gillette's Appendix to its Writ, pages 237 and 239, the Department is applying the Michigan Court of Appeals decision retroactively to other taxpayers.

A.

GILLETTE SATISFIES THE DUE PROCESS/ COMMERCE CLAUSE NEXUS STANDARD APPLIED BY THE MICHIGAN COURT OF APPEALS.

In its application for leave to appeal to the Michigan Supreme Court (Petitioner's Appendix at 69), Gillette readily acknowledged that it satisfied the Due Process/Commerce Clause nexus standard applied by the Michigan Court of Appeals. On page 7 of its application for leave (Petitioner's Appendix at 92), Gillette stated:

> The Opinion next proceeded to determine whether there was sufficient nexus in Michigan to constitutionally apply the SBT to Gillette. It relied heavily upon the Supreme Court's recent "nexus" opinion in Quill Corp v North Dakota, 504 US ____; 112 S Ct 1904; 119 L Ed 2d 91 (1992), concluding under the Due Process and Commerce Clause tests, that Gillette's activities were sufficient to permit Michigan to constitutionally impose the SBT during each of the years at issue. (This conclusion was never at issue, and

would have been admitted by both parties.)

(emphasis added).

B.

THE DECISIONS OF THE MICHIGAN COURT OF APPEALS AND THE MICHIGAN TAX TRIBUNAL ALSO INDICATE THAT GILLETTE'S ACTIVITIES IN MICHIGAN EXCEEDED THE ACTIVITIES PROTECTED BY PUBLIC LAW 86-272.

On June 19, 1992, this Court issued its decision in Wrigley, supra, in which the Court for the first time interpreted the meaning of solicitation contained in PL 86-272. In interpreting the meaning of "solicitation", this Court adopted a middle ground between the parties' polarized positions, and articulated the proper standard as being one which draws the line "between those activities that are entirely ancillary to requests for purchases - those that serve no independent business function apart from

their connection to the soliciting of orders - and those activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force." 120 L. Ed. 2d at 189. In Wrigley, this Court determined that the following activities were protected solicitation: (1) in-state recruiting, training and evaluation of sales representatives; (2) in-state use of hotels and homes for sales-related meetings, and (3) its in-state contacts concerning credit disputes. 120 L. Ed. 2d at 193. In contrast the Court concluded that the following activities were not ancillary and therefore exceeded solicitation: (1) the replacement of stale gum; (2) the supplying of gum through agency stock checks; and (3) the storage of gum. 120 L. Ed. 2d at 192-193.

Although the opinion of the Michigan Court of Appeals did not state the facts with any depth, the facts which it stated indicated that Gillette's activities exceeded those protected by PL 86-272.

1. Replacement of Defective and Damaged Merchandise.

On page 1 of its opinion the Michigan Court of Appeals stated:

> The sales representatives took orders from customers and submitted them to the main office, review customers' displays and shelving arrangements of Gillette merchandise, informed customers of promotions offered by petitioner and replaced defective merchandise.

(emphasis added). Petitioner's Appendix at 4.

The replacement of defective or damaged merchandise by Gillette's employees

in Michigan clearly exceeds the activities protected by PL 86-272. In Wrigley this Court stated:

> We conclude that the replacement of stale gum, the supplying of gum through "agency stock checks," and the storage of gum were not ancillary. As to the first: Wrigley would wish to attend to the replacement of spoiled product whether or not it employed a sales force. Because that activity serves an independent business function quite separate from requesting orders, it does not qualify for § 381 immunity. Miles Laboratories, 274 Ore, at 400, 546 P.2d, at 1083. Although Wrigley argues that gum replacement was a "promotional necessity" designed to ensure continued sales, Brief for Respondent 31, it is not enough that the activity facilitate sales; it must facilitate the requesting of sales, which this did not.

120 L. Ed. 2d at 192.

In its opinion the Michigan Tax Tribunal had also found that Gillette's employees in Michigan engaged in the replacement of defective or damaged

merchandise. On page 7 of its Opinion and Judgment the Tax Tribunal made the following findings of facts:

> Damaged and defective merchandise is eventually returned to Gillette for replacement or adjustment. The larger client or customer is allowed to handle this problem at its own place of business. The sales representative of Gillette will check over the damaged or defective merchandise, send a list to the home office for approval and a credit voucher, and require the customer to destroy the damaged or defective merchandise. There are some accounts, such as Kroger's, that require the sales representative to replace the damaged or defective goods from the car trunk inventory.

(emphasis added). Petitioner's Appendix at 212.

Additionally, the Tax Tribunal concluded:

> We conclude that Petitioner went beyond the definition of solicitation while conducting its business activities within the State of Michigan. The following activities by the Petitioner support that conclusion:

1. Salesmen had supplies of Gillette products in the trunks of their leased cars, which were used to replace damaged or returned property;

Petitioner's Appendix at 222.

The record in this matter, including exhibits and testimony, supported the Tax Tribunal's findings and indicated that Gillette's employees regularly and routinely replaced defective or damaged merchandise or verified damaged or defective merchandise.

In addition to the replacement of defective or damaged merchandise, there were other activities of Gillette which exceeded the activities protected by PL 86-272.

2. Actual Sales, Not Solicitation, During the Tax Years 1976 Through 1978.

Making actual sales is not a protected activity. Wrigley, 120 L. Ed. 2d

at 189, n. 5. In its findings of fact the Tax Tribunal indicated that in 1976 Gillette had taxable sales in the amount of $46,870.00 (Petitioner's Appendix at 208). This conclusion was also supported by evidence in the record. The Department of Treasury conducted a sales tax audit of Gillette for the years 1974 through 1978. In the audit the auditor determined that Gillette made actual sales in Michigan for all of the years, including 1976 through 1978. These amounts were not de minimis. As indicated on the audit report, the amount of the gross sales was $213,121 in 1976, $262,333 in 1977 and $143,269 in 1978. Equally important, the audit report indicated that Gillette was filing sales tax returns and reporting taxable sales for the years 1976 through 1978.

3. The Retail Advertising/Display Agreements.

In Wrigley this Court noted that Wrigley engaged in print, radio and television advertising in Wisconsin. However, "the purchase and placement of that advertising was managed by an independent advertising agency located in Chicago." 120 L. Ed. 2d at 183.

In this case the Michigan Tax Tribunal concluded that the sales representatives in Michigan were actively engaged in advertising activities. On page 8 of the Opinion and Judgment, the Tax Tribunal stated:

> The salesmen negotiate Retail Advertising Display Agreements on Gillette's behalf. This agreement is signed by the customer and the salesman for the purpose of providing an incentive for promotion of certain Gillette products. A display allowance is granted if the customer advertises during the promotion period as agreed.

(emphasis added). Petitioner's Appendix at 213.

The record supported the Tax Tribunal's conclusion. A copy of the Retail Advertising/Display Agreement was included in the record as Exhibit R-51. The Retail Advertising/Display Agreement indicated that the sales representative played an integral role in the execution and performance of the agreement between the customers and Gillette. Under the terms of agreements the sales representative had authority to approve advertising. The customer submitted the Advertising/Display Agreement to the Gillette sales representative no later than 30 days after the performance date. The agreement provided a space for the customer's signature and the Gillette's salesman's signature.

Most importantly, the Retail Advertising/Display Agreement provided for the payment of an allowance from Gillette to the customers. Under Part III of the Agreement, the terms provided:

> Payment of advertising/display allowances will be made by check directly to customers providing the following are performed:

The first condition was that the agreement was to be submitted to the sales representative. The agreement stated:

> A. Advertising/Display Agreement must be submitted to the Gillette Sales Representative no later than 30 days after final performance date as noted on reverse side of this contract.

4. Activities of Merchandisers.

In regards to the merchandisers, the Michigan Tax Tribunal stated in its

Opinion and Judgment:

> 2. In 1976, Petitioner employed 22 part-time merchandisers. These merchandisers faced and dusted merchandise, proportioned all racks, shelves and displays, replaced damaged merchandise, etc. (see Exhibit R-16). During 1977-1981, Petitioner employed a district manager and salesmen who performed activities which included merchandisers' functions, but no merchandisers were employed in 1977;

Petitioner's Appendix at 222.

The merchandisers were not involved in the actual solicitation of sales. Their duties included:

a. Face and dust merchandise.

b. Properly proportion all racks, shelves and displays.

c. Price and pack out merchandise.

d. Replace reasonable quantities of damaged and unsalable merchandise.

e. Build and maintain displays.

f. Utilize "POP" material where authorized.

g. Inventory items for which an order will be requested.

Under Wrigley most of these activities appear to be ancillary to solicitation. However, as discussed above, the replacement of damaged and defective merchandise exceeds the solicitation of sales.

5. The Operation of a Commercial Vehicle.

In regards to the operation of commercial vehicles in Michigan, the Michigan Tax Tribunal Opinion and Judgment stated:

> In 1981, Gillette obtained a Motor Carrier Diesel Fuel Tax License from the State of Michigan for the purpose of operating a commercial motor vehicle in Michigan. This license enabled an individual or business to travel in Michigan as a motor carrier and to receive a six cent per gallon discount on the purchase of diesel fuel. Gillette received $35.75 as a rebate on diesel fuel

> tax paid for the year 1981. A total of 9,265 miles were traveled by the commercial vehicle registered by Gillette in the State of Michigan during 1981 based on Motor Carrier Diesel Fuel tax returns filed.

Petitioner's Appendix at 211.

As indicated by the Michigan Tax Tribunal, for the year 1981 Gillette filed quarterly Motor Carrier Diesel Fuel Tax returns, reporting the amount of diesel fuel used in the operation of its commercial motor vehicles in Michigan. The quarterly Motor Carrier Diesel Fuel Tax returns indicated that the Gillette Company used and operated a licensed commercial vehicle for the following amount of miles in Michigan during 1981:

Quarter	Miles in Michigan
January-March	1600
April-June	2471
July-September	2957
October-December	2237

The record did not indicate what the commercial vehicle was used for, and Gillette did not offer any testimony concerning the commercial vehicle.

In summary the activities of Gillette were similar to the activities of Wrigley. Gillette, like Wrigley, engaged in some activities which are ancillary to solicitation. However, like Wrigley, Gillette clearly engaged in other activities which are not protected by PL 86-272.

C.

THE MICHIGAN COURT OF APPEALS' DECISION DETERMINING THAT THE SINGLE BUSINESS TAX WAS NOT A NET INCOME TAX AND APPLYING THE PROPER NEXUS STANDARD TO THE SINGLE BUSINESS TAX IS A QUESTION OF STATE LAW.

This is not a case in which the taxpayer is claiming that as a matter of

constitutional law the wrong nexus standard was applied and that its activities do not satisfy the constitutional nexus standard. Gillette has acknowledged that it has substantial nexus with Michigan. Gillette's claim is simply that the Michigan Court of Appeals should have continued to apply the erroneous administrative nexus standard instead of the Due Process/Commerce Clause nexus standard.

The determination that the SBT was not a net income tax is initially a question of state law. Moreover, the decision of the Michigan Court of Appeals to correct the administrative interpretation and apply the proper nexus standard to a pending litigant is also a question of state law and does

not raise an important question of federal law. When questions of state law are at issue, state courts have the authority to determine the retroactivity of their decisions. Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364; 53 S. Ct. 145; 77 L. Ed. 360 (1932).

In Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673; 50 S. Ct. 451; 74 L. Ed. 1107 (1930), this Court stated:

> It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; . . . .

281 U.S. at 680.

This is exactly what the Michigan Court of Appeals was doing--declaring

that the SBT was not a net income tax and that, accordingly, PL 86-272 was not applicable to the SBT.

Gillette was well aware of the controversy concerning the appropriate nexus standard. Contrary to Gillette's claim in its Petition For Writ of Certiorari, Gillette did discuss the question of the application of the Due Process/Commerce Clause standard instead of PL 86-272. In its original brief in the Michigan Court of Appeals (Appellant's Brief dated November 12, 1989), Gillette argued that the Tax Tribunal erred in applying a different nexus standard. Argument VII of Gillette's original brief in the Court of Appeals stated:

> VII. ONCE THE DEPARTMENT ADMITTED THAT IT HAD UNIFORMLY APPLIED THE PL 86-272 TEST FOR TAXABLE STATUS IN

ALL YEARS AT ISSUE, THE TRIBUNAL ERRED BY APPLYING A DIFFERENT STANDARD TO DETERMINE WHETHER GILLETTE WAS TAXABLE IN MICHIGAN FOR THE YEARS 1976-1979.

D.

THE MICHIGAN COURT OF APPEALS' RETROACTIVE APPLICATION OF THE PROPER NEXUS STANDARD IS SUPPORTED, IF NOT MANDATED, BY DECISIONS OF THIS COURT.

The application of the Due Process/Commerce Clause nexus standard, clarified in Quill, supra, to Gillette does not violate Due Process or Equal Protection. Although Gillette maintains that the Due Process/Commerce Clause nexus standard should not be applied in this case, in Harper, supra, this Court mandated the retroactive application of its decisions concerning federal law to "all cases still open on direct review . . . ." 125 L. Ed. 2d at 86. After

this Court's decision in Wrigley, the Department's position concerning PL 86-272 was no longer viable. Accordingly, when the Michigan Court of Appeals determined that PL 86-272 was inapplicable to the SBT and that the appropriate nexus standard was the Due Process/Commerce Clause nexus standard, it was appropriate for the Michigan Court of Appeals to apply that standard to all pending cases. Indeed, it would have been contrary to Harper for the Michigan Court of Appeals to apply the Due Process/Commerce Clause nexus standard in Guardian, which was decided the same day as the Gillette case, but not apply it in this matter.

The longstanding rule of law in Michigan also favors retroactive appli-

cation of decisions. Placek v. Sterling Heights, 405 Mich. 638, 664; 275 N.W.2d 511 (1979), Donohue v. Russell, 264 Mich. 217, 219; 249 N.W. 830 (1933).

E.

RETROACTIVE APPLICATION OF THE PROPER NEXUS STANDARD DOES NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION.

In James B. Beam Distilling Co. v. Georgia, 501 U.S. ___; 111 S. Ct. 2439; 115 L. Ed. 2d 481 (1991), and again in Harper, this Court repudiated the theory of selective prospective application; i.e., applying a new rule to the litigants but not to other cases which were still open. Although Gillette claims that it is being denied equal treatment in the retroactive application of the Michigan Court of Appeals decision, there is nothing to substantiate

Gillette's claim. In its decision in the Gillette case and the Guardian case, the Michigan Court of Appeals did not limit the application of its decisions prospectively to other taxpayers. Indeed, in a subsequent unpublished opinion, the Michigan Court of Appeals did apply the Due Process/Commerce Clause nexus standard in an open case involving the years 1979 through 1981 even though the Department and the Tax Tribunal had applied PL 86-272. Michigan Chrome and Chemical v. Dep't of Treasury, Court of Appeals Docket No. 137977 (1/4/94); 2 CCH Mich. Tax Rep. ¶ 400-322, pp. 31.433-31.434.

Moreover, as the appendices to Gillette's Petition For Writ of Certiorari demonstrate, the Department

did not apply the Guardian and Gillette decisions prospectively. As indicated in the letters on page 237 and 239 of Gillette's Appendix, the Department sent letters to businesses which had not filed SBT returns for the year "ending in and after 1989". This was four years before the Court of Appeals decisions in Gillette and Guardian.

Gillette's argument that it cannot be treated differently from other businesses for the years 1976 through 1981 concerning what nexus standard was applied has no merit. Due process only requires that Gillette be treated the same as all pending litigants. Harper, 125 L. Ed. 2d at 86. It would violate Due Process for the Department to attempt to apply the Due Process/

Commerce Clause nexus standard to all businesses back to the year 1976. In McKesson Corp. v. Division of Alcoholic Beverages, 495 U.S. ___; 110 S. Ct. 2238; 110 L. Ed. 2d 17 (1990), this Court recognized that retroactive imposition and collection of taxes "beyond some temporal point" "would violate due process by unduly interfering with settled expectations". 495 U.S. at 40-41, fn. 23.

Gillette's alleged reliance upon the erroneous administrative interpretation does not raise Due Process or Equal Protection claims. In Brinkerhoff, supra, this Court noted:

> [T]he mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth

Amendment or otherwise confer appellate jurisdiction on this Court.

(emphasis added). 281 U.S. at 680.

F.

THIS CASE DOES NOT INVOLVE INTENTIONAL, SYSTEMATIC AND ARBITRARY DISCRIMINATION.

In its petition Gillette cites this Court's decision in Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239; 52 S. Ct. 133; 76 L. Ed. 265 (1931). Despite Gillette's claims to the contrary, this case, unlike the Iowa-Des Moines case, does not involve intentional, systematic and arbitrary discrimination. In Iowa-Des Moines, the Iowa Supreme Court acknowledged that there had been intentional, systematic and arbitrary discrimination. That is not the situation in this matter.

The essence of Gillette's complaint is the retroactive effect which happens to any litigant when a legal precedent or administrative practice is overturned. Obviously, there are persons to whom the new rule of law could not be applied because of the passage of time or because of res judicata. This effect of retroactive application was specifically recognized in Justice Souter's opinion in Beam, supra, in which he explained:

> Of course, retroactivity in civil cases must be limited by the need for finality, see Chicot County Drainage District v Baxter State Bank, 308 US 371, 84 L Ed 329, 60 S Ct 317 (1940); once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed. It is true that one might deem the distinction arbitrary, just as some have done in the criminal context with respect to the distinction between direct review and habeas: . . . .

115 L. Ed. 2d at 492.

The inherent limitations upon the retroactive application of judicial decisions are not grounds for a claim of intentional, systematic and arbitrary discrimination. In Harper this Court specifically recognized that its decisions could only be applied retroactively to "all cases still open on direct review . . . ." 125 L. Ed. 2d at 86. Likewise, in McKesson, supra, this Court recognized that retroactive imposition and collection of taxes was prohibited beyond some temporal point. 495 U.S. at 40-41. As indicated above, the State of Michigan is following both of those decisions.

CONCLUSION

This case does not involve the decision of a state court of last resort which has decided a federal question in a way that conflicts with another state court of last resort or of a United States Court of Appeals. Likewise, this case does not involve an important question of federal law which should be settled by this Court nor does it involve a state appellate court decision which has decided a federal question contrary to decisions of this Court.

What this case does involve is a case in which the taxpayer's business activities in Michigan clearly exceeded any nexus standard, PL 86-272 or the Due Process/Commerce Clause nexus standard. What this case does involve is a deci-

sion of the Michigan Court of Appeals in which the Court of Appeals determined that the nexus standard used by the tax administrators, PL 86-272, was no longer viable based upon decisions of this Court and in which the Court of Appeals applied the proper nexus standard. Gillette is not claiming that the Due Process/Commerce Clause is not the proper standard, nor is Gillette claiming that it did not have "substantial nexus" in Michigan.

Equally important, the action of the Michigan Court of Appeals in retroactively applying the proper nexus standard to all open cases, i.e., Gillette and Guardian, is in accordance with the decisions of this Court. For all of these reasons, Respondent requests that

the Petition For Writ of Certiorari be denied.

Respectfully submitted,

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